Supreme Court of the United States

October Term, 1894.

HANNAH O'CALLAGHAN and MICHAEL CORCORAN, Appellants,

v.

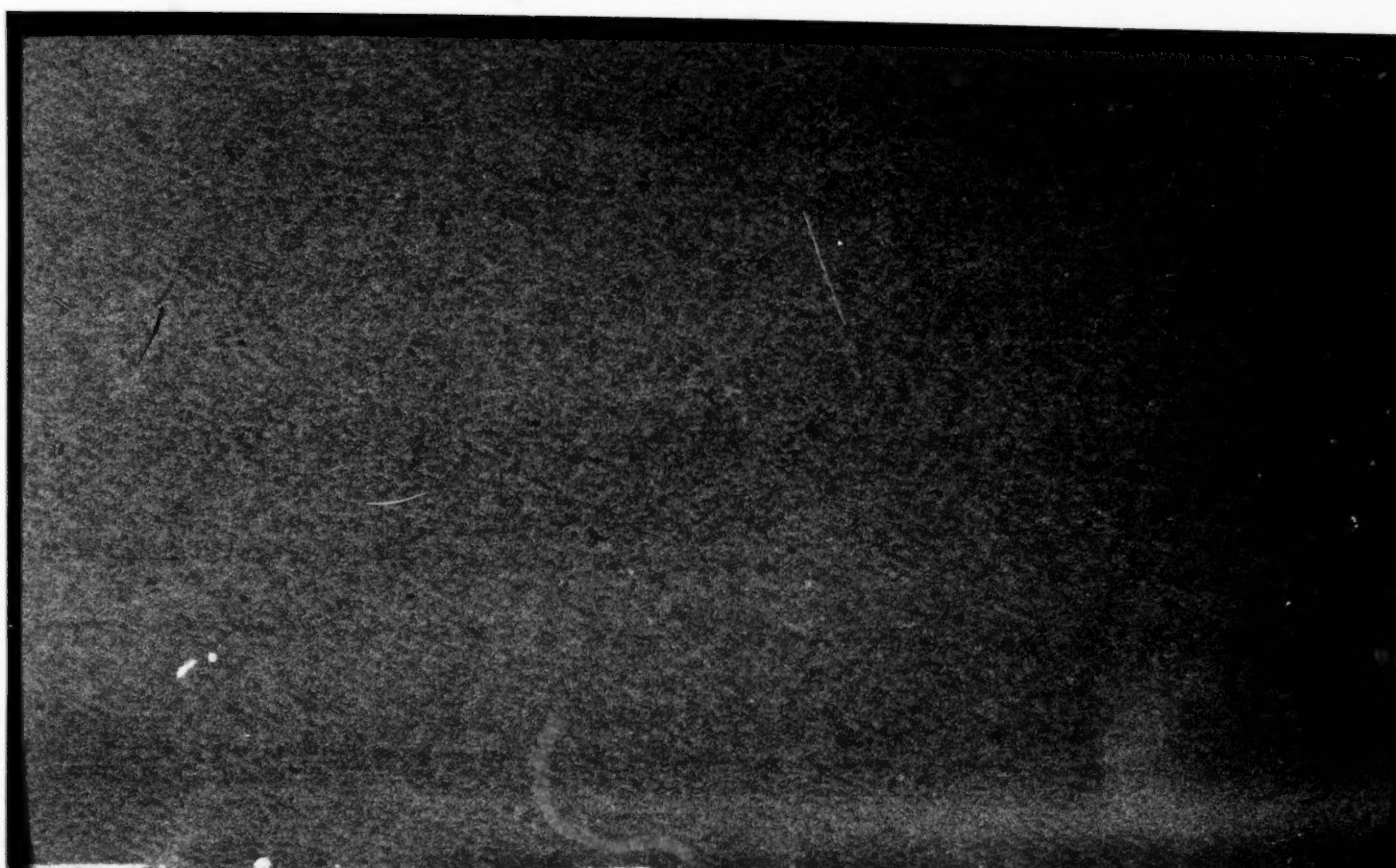
TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, Appellees.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Brief of Counsel for Appellants, in Opposition to the Motion to Dismiss the Appeal.

JAMES K. HOWE,
Counsel for Appellants.

SAMUEL H. PILES,
GEORGE DONWORTH,
CHARLES H. FARRELL,
F. D. McKENNEY,
Of Counsel.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Appellants*,

v.

TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAU, *Appellees*,

No. 593

APPEAL FROM THE CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANTS, IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL.

I.

The appellee Marie Carrau alone has moved to dismiss the appeal in this case. The grounds of the motion are thus stated by her counsel at page 10 of their brief:

"First: Because the decision of the Circuit Court of Appeals is final, under section 6 of the Judiciary Act of March 3, 1891; and

Second: Because it is clear from the record that neither the Circuit Court, the Circuit Court of Appeals, nor this court has any jurisdiction of the case."

We agree with counsel that the Circuit Court of Appeals had no jurisdiction of the case. We deny that this court is without jurisdiction, and we deny that the Circuit Court was without jurisdiction.

The first question to be considered, then, is whether this court is without jurisdiction for the reason that the decree of the Circuit Court of Appeals was final. If the decree of the Circuit Court of Appeals was not final, this court has jurisdiction, because an appeal then exists as a matter of right.

"But to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was *dependent 'entirely'* upon *diverse citizenship.*" (Italics ours).

Northern Pacific v. Soderberg, 188 U. S. 526.
Ayres v. Polsdorfer, 187 U. S. 585.
Howard v. U. S. to the use of Stewart, 184 U. S. 676.
Hugulcy Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290.
Loeb v. Columbia Township, 179 U. S. 472.
Robinson v. Caldwell, 165 U. S. 359.
Colo. Cent. Co. v. Turck, 150 U. S. 138.

The bill invoked the jurisdiction of the Circuit Court upon two grounds:

First: Because complainants were aliens, subjects of the King of Great Britain and Ireland, and defendants were citizens of the United States and of the State of Washington, and the amount involved was sufficient.

Second: Because the case involved the construct-

ion and application of the Fourteenth Amendment to the Constitution of the United States, to prevent complainants from being deprived of their property without due process of law, under authority of the State of Washington, by a judgment of the state court and proceedings thereon, all rendered and taken without jurisdiction and without notice to complainants.

The original jurisdiction of the Circuit Court was specifically invoked on both of these grounds (R., pp. 16, 17). The appellee Carrau filed a motion in the Circuit Court to dismiss the bill for want of jurisdiction, in which she alleged that the matters pleaded in the bill were "not cognizable in the Federal Court." (R. p. 29).

The Circuit Court took jurisdiction of the case, required her to answer, and she filed an answer in which she again challenged the jurisdiction of the Circuit Court, and specifically denied that the vesting of the title and possession of the property of complainants in her would be depriving complainants of their property without due process of law, and denied that the same would be in violation of their rights under the Fourteenth Amendment to the Constitution of the United States (R. p. 73).

The Circuit Court rendered a decree upon the merits in favor of complainants.

The opinion of the Circuit Judge, which it is permissible to refer to,

(Loeb v. Trustees, 179 U. S. 472).

shows that the Circuit Judge treated both grounds of jurisdiction as well founded (R. pp. 240, 241, 242).

The appellee Carrau alone appealed from the decree to the United States Circuit Court of Appeals. She attempted to assign numerous errors on the part of the

Circuit Court, but an inspection of her assignments of error will show that the only matter properly assigned was that the Circuit Court had no jurisdiction of the subject matter of the suit (R. pp. 254, 257). The Circuit Court of Appeals refused to decide the case upon the merits, and rendered a decree reversing the decree of the Circuit Court with directions to dismiss the bill (R. p. 1452).

In the opinion of the Circuit Court of Appeals, that court said:

"We are of the opinion that the court below was without jurisdiction of the subject matter of the suit, and further that all necessary parties were not before the court, some of whom, if made parties, would have ousted the court of jurisdiction. On both of these grounds we think that the court below should have dismissed the bill at the complainant's cost (R. p. 1441). * * * Without reference to the merits of the suit, concerning which we cannot properly indicate any views, it results that the judgment must be and hereby is, reversed, and the cause remanded to the court below with directions to dismiss the bill at complainant's costs." (R. 1452).

The first question then, which is presented to this court, is whether the decree of the Circuit Court of Appeals was final because the jurisdiction of the Circuit Court was *dependent entirely on diverse citizenship*, and that therefore this court is without jurisdiction.

As before stated, the Circuit Court of Appeals held that jurisdiction in the Circuit Court could not exist by reason of diverse citizenship. Does the word "dependent" in that clause of the Act of March 3, 1891, making the decree of the Circuit Courts of Appeals final in all cases where the jurisdiction is dependent entirely on diversity of citizenship, mean jurisdiction in the Circuit Court

must exist entirely by reason of diverse citizenship, or does it mean that the jurisdiction of the Circuit Court must be *invoked entirely* upon the ground of diverse citizenship? If the meaning of the statute is that jurisdiction must *exist* in the Circuit Court entirely by reason of diverse citizenship, then the decree of the Circuit Court of Appeals could not be final in a case where the decree of the Circuit Court of Appeals holds that such jurisdiction did not exist.

If, upon the other hand, the true construction of the provision of the Act of March 3, 1891, making the decree of the Circuit Courts of Appeals final in all cases where the jurisdiction of the Circuit Court is dependent entirely upon diverse citizenship, is that the word "dependent" means "invoked", then it is equally clear that the decree of the Circuit Court of Appeals in this case was not final, because the bill shows that the jurisdiction of the Circuit Court was invoked not only on the ground of diverse citizenship, but also upon the ground, specifically alleged in the bill, that the complainants were under State authority about to be deprived of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

The interpretation which has been placed by this court upon the word "dependent" in the act, has not been uniform. It has in some cases been interpreted as meaning that the jurisdiction of the Circuit Court must have *attached;* in others that it must have been *invoked.* It is apparent that entirely different results might follow by giving these different meanings to the same word. If the word "dependent" means "attached", in the sense that jurisdiction in the Circuit Court must *exist entirely* by reason of diversity of citizenship, as distinguished from

the jurisdiction being *invoked* upon that ground but not existing, then there is no difficulty in harmonizing the various provisions of the act. If, however, the word "dependent" is to be interpreted as synonymous with "invoked", then the decree of the Circuit Court of Appeals cannot be held final, where the bill invokes the jurisdiction of the Circuit Court both upon diversity of citizenship and also upon other grounds, although such other grounds might not be sufficient for the jurisdiction of the Circuit Court to attach on those alone, if diversity of citizenship were not pleaded.

It cannot, we submit, be the law, that in determining the question of the finality of a decree of the Circuit Court of Appeals, the word "dependent" means "invoked" upon the ground of diversity of citizenship only, and therefore, whether rightfully or wrongfully invoked on that ground, the decree of the Court of Appeals is final, while the same word, in determining whether the jurisdiction of the Circuit Court of Appeals is dependent on that ground and also some other ground, means that such other ground of jurisdiction of the Circuit Court must in fact exist in order to prevent the decree of the Circuit Court of Appeals from being final.

In the case of

Florida Central & Peninsular R. R. Co., v. Bell,
176 U. S., 321,

the plaintiffs brought a joint action in ejectment against the railroad company, a Florida corporation. The citizenship of certain of the plaintiffs was disclosed by the complaint. The citizenship of other plaintiffs was not shown. The Circuit Court took jurisdiction of the case on the theory that it was one arising under the laws of the United States. Judgment was rendered in favor

of the plaintiffs. A writ of error was taken to the Circuit Court of Appeals, and the judgment of the Circuit Court was affirmed. A writ of error was then prosecuted to this court to review the judgment of the Circuit Court of Appeals.

Mr. Justice Shiras, in delivering the opinion of this court, said:

"Our first inquiry is whether this court has jurisdiction to review the judgment of the Circuit Court of Appeals. The writ of error in this case was brought under section 6 of the Judiciary Act of March 3, 1891. If the judgment of the Circuit Court of Appeals was final under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different states. Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. Rep. 35; Press Pub. Co. v. Monroe, 164 U. S. 105.

This question must be answered upon an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that plaintiffs *invoked* the jurisdiction of that court because the parties were citizens of different states, or because the case was alleged to be one arising under the constitution, laws or treaties of the United States? The action was in ejectment, to recover possession of a tract of land in Hillsboro County, State of Florida. The plaintiffs were eight in number, three of whom were alleged to be citizens of the State of Texas, and there was no allegation as to the citizenship of the other five. The defendant, the Florida Central and Peninsular R. R. Co., was alleged to be a corporation organized and existing under the laws of Florida, hence upon the face of the declaration the jurisdiction of the Circuit Court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties. The declaration, however, alleges

that the plaintiffs claim title to the land in dispute by virtue of a patent granted to their ancestor by the government of the United States; that the defendant claimed title under the first section of an Act of Congress entitled 'An Act granting public lands in alternate sections to the states of Florida and Alabama, to aid in the construction of certain railroads in said states,' approved May 17, 1856; and further, that the defendant railroad company claimed and insisted that it was entitled to locate and maintain the route of its road through the land in question under said act of Congress.

Accordingly, it appears that the *theory* of the plaintiffs in bringing their suit in the Circuit Court of the United States was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an act of Congress, and was therefore a case arising under the laws of the United States. This was the view of the judge who tried the case in the Circuit Court, as he refused to grant defendant's motion to dismiss for want of jurisdiction, and this view was also taken by the Circuit Court of Appeals, as appears in the following passage of its opinion:

'There is no effort in this case to found the jurisdiction of the Circuit Court on the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of the Circuit Court entertained jurisdiction of the case on that ground * * *'.

As, then, the plaintiffs in the Circuit Court *claimed* in their declaration that the controversy was one that turned on a construction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final, because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different states. * * *

We come to the case, then, as one in which we have a right to supervise the judgment of the Circuit Court of

Appeals, and the first question, and indeed, as we read the record, the only one we have to meet, is whether the Circuit Court had jurisdiction of the case. Not having, as we have seen, jurisdiction, because of a controversy between citizens of different states, did it have jurisdiction because the case was one arising under the Constitution or laws of the United States? This question was answered affirmatively in both courts below, and this because, as it seemed to them, the plaintiff's declaration disclosed such a case. * * *

(p. 332). Apart from the question of jurisdiction arising from the presence of any Federal question, can it be said that jurisdiction did *attach* in respect to those plaintiffs who were alleged to be citizens of Texas? * * *

(p. 335). As, then, in the present case, the plaintiffs elected to assert a joint claim and title to the land in dispute, and recovered a joint judgment for their undivided interest therein, and as the plaintiff's declaration discloses no Federal question, the principles of the cited cases apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court. * * *

The judgment of the Circuit Court of appeals is reversed. The judgment of the Circuit Court is likewise reversed and the cause is remanded to that court with directions to dismiss the action for want of jurisdiction."

If in the case cited, the Circuit Court of Appeals had erroneously held that jurisdiction did exist in the Circuit Court by reason of diversity of citizenship, as well as by reason of the existence of a Federal question, its decree would not have been final, because it also erroneously determined in favor of the plaintiff the existence of the Federal question. This case, therefore, clearly shows that the construction to be given to that clause of the act making the decrees of the Circuit Courts of Appeals final, is to be determined, not by ascertaining whether juris-

diction in the Circuit Court exists, but whether it is claimed in good faith and not fictitiously in the pleading which invokes the jurisdiction of the Circuit Court. It is also plain from this decision that in determining the finality of the decree of the Circuit Court of Appeals the question is not, upon what ground can the decree of the Circuit Court be sustained, because in the case just cited, it could not be sustained at all; but the question is, upon what ground was the jurisdiction invoked by the party seeking it?

If the decree of the Circuit Court of Appeals is to be held final in cases where the jurisdiction of the Circuit Court cannot attach by reason of any Federal question, although invoked on that ground, then the decision just cited would not have been rendered. Neither in the case at bar, can the decree of the Circuit Court of Appeals be held final, because the jurisdiction of the Circuit Court is dependent entirely on diverse citizenship, when the jurisdiction of the Circuit Court was invoked on other grounds than diverse citizenship, and the Circuit Court of Appeals denied the jurisdiction of the Circuit Court on the ground of diverse citizenship.

"When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff *invoked* the authority of that court *only upon that ground.*"

Loeb v. Trustees, 179 U. S. 472, 479.

"Section 6 provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review the final decisions of the District and Circuit Courts 'in all cases

other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states.' The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court *attaches* solely by reason of diverse citizenship, it follows that the court of appeals has power to review the judgment of the circuit court in every such case, notwithstanding constitutional questions may have arisen *after the jurisdiction of the circuit court attached*, by reason whereof the case became embraced by section 5."

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 280.

From these cases it would seem necessarily to follow that the decree of the Circuit Court of Appeals holding that the jurisdiction of the Circuit Court had not attached, was not final. If, in order to render the decree of the Circuit Court of Appeals final, the word "dependent" is to be interpreted as "attached," the decree in the case at bar was not final, because the court held that the jurisdiction never attached. If the word "dependent" is to be interpreted as synonymous with "invoked," the decree of the Circuit Court of Appeals was not final, because the jurisdiction of the Circuit Court was invoked not entirely upon the ground of citizenship, but upon that ground and also upon the ground that the case was one involving the construction and application of the Constitution of the United States.

"The Act of March 3, 1891, chap. 517 (26 Stat. at L. 826), provides in section 6 that the circuit courts of ap-

peals shall have appellate jurisdiction to review judgments and decrees of the circuit courts in all cases in which a direct appeal is not allowed by section 5 to this court, and that the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

The *jurisdiction* referred to is the *jurisdiction* of the circuit court as originally *invoked*. * * *

If, *after* the jurisdiction of the circuit court *attaches* on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section 5, then the case may be brought directly to this court, although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right. * * *

The ground on which the jurisdiction of the circuit court was *invoked was solely diversity of citizenship*, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals cannot be regarded otherwise than as made final by the statute."

Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S., 290, 294.

"The plaintiff, in her *complaint, did not claim any right under the Constitution and laws of the United States*, or in any way mention or refer to that Constitution or to those laws; and at the trial she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who *invoked the* Constitution and laws of the United States."

Press Pub. Co. v. Monroe, 164 U. S. 105, 112.

The appeal from the Circuit Court of Appeals was therefore dismissed.

In

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397,

this court had presented the question whether the judgment of the Circuit Court of Appeals was final. The suit arose under the revenue laws. This court held that it also arose under the Constitution of the United States. The Government contended that, as the decisions of the Circuit Court of Appeals were made final in cases arising under the revenue laws, this court had no jurisdiction to review the decree of the Circuit Court of Appeals. This court said:

"The meaning of the words 'arising * * * under the revenue laws' in the 6th section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues, and which does not by reason of any question in it, belong also to the class mentioned in the 5th section of that act. We do not think that the words quoted necessarily embrace a case carried to the Circuit Court of Appeals, which, although arising under the revenue laws and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the Constitution or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such a case in the Circuit Court of Appeals to have, as of right, upon writ of error to that court, a re-examination here of the judgment (the requisite amount being involved), if the correctness of the judgment depends in whole or in part upon the application or construction of the Constitution or upon the constitutionality of any act of Congress drawn in question."

We submit, therefore, that in this case, inasmuch as the bill of appellant *invoked* the jurisdiction of the Circuit Court not only upon the ground of diversity of citizenship, but also upon the ground that the case involved the

construction and application of the Constitution of the United States, the decree of the Circuit Court of Appeals, *if it had jurisdiction at all*, was not final.

It was not, we submit, the intention of Congress, by the language used in the act making the decrees of the Circuit Courts of Appeals final in cases where the jurisdiction was dependent entirely upon diversity of citizenship, to enact a law producing the following result:

That the decrees of the Circuit Courts of Appeals are final where the *jurisdiction* of the Circuit Court is dependent entirely upon diverse citizenship, and also in all cases where jurisdiction by reason of diversity of citizenship exists, but where the Circuit Court of Appeals, notwithstanding the existence of diversity of citizenship, erroneously decides that the Circuit Court is without jurisdiction.

II.

The next question to be considered is, whether the bill did invoke the jurisdiction of the Circuit Court upon the ground that the suit involved the construction or application of the Constitution of the United States.

The allegations of the bill and the law of the State of Washington, of which the Circuit Court was called upon to take judicial notice, show substantially the following facts:

Appellants are the heirs at law and next of kin of one John Sullivan, deceased, who died on the 26th day of September, 1900, in King County, Washington, leaving there a large estate, consisting of real and personal property. A special administrator of the estate of the deceased was appointed. Certain persons petitioned that general letters of administration on the estate should

issue, and among them was the appellee, Marie Carrau, who filed a petition setting forth that the deceased had died intestate. The several petitions were brought on for hearing in the Superior Court of the State, and on the 19th of November, 1900, a general administrator of the estate was appointed, who took possession of the real and personal property. The law of the State of Washington provides (Laws of 1895, p. 197, Sec. 1):

"When a person dies seized of lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein in fee or for the life of another, *his title shall vest immediately in his heirs or devisees*, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or any other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent; *provided, that no person shall be deemed a devisee until the will has been probated.* The title and right to possession of such lands, tenements or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the executor or administrator when appointed, and persons lawfully claiming under such executor, or administrator; *and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements or hereditaments, and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the executor or administrator, and those lawfully claiming under such executor or administrator.*"

This section has been construed by the Supreme Court

of the State, which decided that the title passes immediately upon the death of a decedent to his heirs.

Griffin v. Warburton, 23 Wash. 231.
Anrud v. Scandinavian Bank, 27 Wash. 16.

On the 8th day of March, 1901, the appellee, Marie Carran, filed her petition in the Superior Court of the State, for King County, in which she alleged that the deceased, John Sullivan, the night before his death had made a nuncupative will, whereby he bequeathed and devised to her his entire estate, and she prayed that the will be probated.

The law of Washington does not create the right to make a nuncupative will. It simply imposes additional restrictions upon the common law right. Sec. 23, Laws 1854, p. 315.

Pierce's Washington Code, Sec. 2352; Ballinger's Code, 4606; Laws of 1854, p. 316, Sec. 25, provides:

"No proof shall be received of any nuncupative will, unless it be offered within six months after speaking the testamentary words, nor unless the words or the substance thereof be first committed to writing and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper."

Pierce's Code of Washington, Sec. 2331, Ballinger's Code, Sec. 6083, provides:

"In all cases in which citations are issued from the Superior Court in probate proceedings, they shall be served at least ten days before the term at which they are made returnable, except when issued from the court in cases where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such

cases they shall be served in sufficient time to allow the person served to be in attendance on the court."

Code 1881, Sec. 1303, Pierce's Code, Sec. 2321, provides:

"All process issuing out of the probate court shall be attested by the Clerk and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the (Superior) District Court."

The Superior Court of the State of Washington became the successor of the probate courts of the Territory.

Constitution of Washington, Art. 27, Sec. 10, provides:

"When the State is admitted into the Union, and the Superior Courts in the respective Counties organized, the books, records, papers and proceedings of the probate court in each county, and all causes and matters of administration pending therein, shall upon the expiration of the term of office of the probate judges, on the second Monday in January, 1891, pass into the jurisdiction and possession of the Superior Court of the same county, created by this Constitution, and said court shall proceed to final judgment or decree, order, or other determination, in the several matters and causes, as the territorial probate court might have done if this Constitution had not been adopted; and until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the Territory. The Superior Courts shall have appellate and revisory jurisdiction over the decisions of the probate courts, as now provided by law, until such latter courts expire by limitation."

The bill alleged (pp. 14, 15, 16, 17, 19), that immediately upon the petition being filed, a citation was issued by the Superior Court and placed in the hands of the Sheriff of the County for service upon the widow and

next of kin of the deceased; that the Sheriff immediately returned the citation, stating that he was unable to find any such persons in King County, and the State court immediately assumed to admit the pretended nuncupative will to probate, and that the same now stands as though legally probated, on the records of the court; that the Superior Court acted wholly without jurisdiction in assuming to probate the will; that it had no jurisdiction to hear any evidence or to take any steps for the probate of a nuncupative will, where the estate bequeathed exceeded the value of $200.00, and that it was also without jurisdiction to hear any proof for the probate of the will, for the reason that no legal citation had been issued out of the court and because ten days had not elapsed between the filing of the pretended will and the hearing of the proof offered in support of the same, and that a nuncupative will is, under the laws of Washington, invalid where the estate bequeathed exceeds the value of two hundred dollars ($200.00), and that even if valid, it could not dispose of real estate.

The bill alleged that the appellee Carrau had filed her petition in the Superior Court of the State, praying that the entire estate, including the real and personal property, should be distributed to her, and that the Superior Court would, complainants were informed and believed, distribute the estate to her; that she was insolvent, and if she received possession of the property she would dispose of the same and put the complainants to the necessity of instituting a multiplicity of suits; that the Superior Court was without jurisdiction to distribute the real estate or any part thereof; that the real estate and the rents and profits produced thereby since the death of the deceased, were the property of the complainants; that the administrator would obey the order of the Su-

perior Court and surrender the real estate and the rents and profits, to the appellee Carrau, and thereby the complainants would be deprived "of their said property without due process of law, in violation of the rights of your orators and each of them under the Fourteenth Amendment to the Constitution of the United States."

The bill further alleged that if the pretended probate be allowed to stand, the will was invalid, and that if valid it could not convey real estate; and it prayed that the appellee Marie Carrau be enjoined and restrained from receiving possession of the property or interfering with it in any manner during the pendency of the suit, and that upon final hearing she be perpetually restrained and enjoined from setting up any title or claim under the pretended will, and that the administrator be required to account to the complainants for the property.

Sec. 2671 of Pierce's Code of Washington (Ballinger's Code, Sec. 6374), provides:

"At any time after six months from the issuing letters testamentary or of administration, any heir, legatee or devisee may present his petition to the court that the legacy or share of the estate to which he is entitled may be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate."

It was under this section that the appellee Marie Carrau, as an alleged legatee and devisee of the deceased, had filed her petition praying the distribution of the estate to her, and in order to file this petition she was, of course, bound to set up as her muniment of title, the alleged decree probating the will made on the same day it was filed, and without notice to appellants or anyone else.

The statute of 1895, above set forth, distinctly provided:

"No person shall be deemed a devisee until the will has been probated."

It will be seen, therefore, that the title to the property of the deceased had immediately on his death passed to the appellants, and that appellee could not divest them of that title and become a devisee, unless she had a decree of the court probating the will. The statute above cited provided that

"No proof shall be received of any nuncupative will unless offered within six months after speaking the testamentary words, nor unless the words or the substance thereof be first committed to writing and a citation issued to the widow or next of kin to the deceased, that they may contest the will if they think proper."

In other words, the title to the property had passed to the appellants, as heirs at law and next of kin of the deceased, subject to their being divested of their title by the probate of the will.

It appears from the bill that at the time it was filed, more than six months had elapsed since the death of the deceased. If the alleged will had not then been probated, appellants' title to the property was absolute. Whether the alleged will had been probated or not depended on whether the court entering the decree of probate had acquired jurisdiction to render a decision probating the will. If the court had no jurisdiction to probate the will, and the appellee Carrau, by using the decree of probate as a muniment of title was about to obtain from the administrator the property in his custody, belonging to the appellants, by the authority of the state court, appellants would be deprived of their property without due process of law, in contravention of the provisions of the Fourteenth Amendment to the Constitution of the

United States. In other words, the question presented by the bill was not simply whether the decree probating the will was valid or void, but, being void for want of jurisdiction in the court to render it, the attempt to take the property of the appellants by authority of the void decree and under authority of the State Court, was a violation of their rights under the Fourteenth Amendment.

In

Scott v. McNeal, 154 U. S. 34,

this court had before it on writ of error to the Supreme Court of the State of Washington, the question whether Scott had been deprived of his property without due process of law. The court said:

"The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the probate court of the county of Thurston and territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888. * * *

The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him. * * *

The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte* Virginia, 100 U. S. 313, 318, 319; *Ex parte* Virginia, 100 U. S. 339, 346; Neal v. Delaware, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in United States v. Cruikshank, 92 U. S. 542, 554, repeating the

words of Mr. Justice Johnson in Bank of Columbia v. Okely, 17 U. S. 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. Huntington v. Attrill, 146 U. S. 657, 683, 684; Mobile & O. R. Co. v. Tennessee, *ante*, p. 793.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.'"

The court then held that the statute of Washington did not warrant the conclusion that the probate court was

authorized to conclusively decide as against a living person that he was dead, and that his estate was therefore subject to be administered on and disposed of by the probate court, and the judgment of the Supreme Court of the State of Washington affirming the judgment of the Superior Court in the case where the record in the administration proceedings had been introduced against Scott, was reversed.

The sole ground upon which this court obtained jurisdiction on the writ of error to the Supreme Court of the State of Washington, was that the judgment rendered holding that Scott was dead, when he was in fact alive, under which judgment his property had been taken, was void, and that when that judgment was received in evidence as a muniment of title, Scott was thereby deprived of his property without due process of law.

In

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234,

this court, speaking of the Fourteenth Amendment, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State; to its legislative, executive and judicial authorities, and therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' * * *

These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34, in which it was held that the prohibitions of the 14th Amendment extended to 'all

acts of the state, whether through its legislative, its executive, or its judicial authorities'; and consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the 14th Amendment."

In

Winsor v. McVeigh, 93 U. S. 274, 277,

Mr. Justice Field, delivering the opinion of this court, said:

"A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. *Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization, over the subject matter.*"

At page 281 of the opinion, Mr. Justice Field said, in reference to proceedings *in rem*, and after citing Woodruff v. Taylor, 20 Vermont, 65,

"The court observed that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*.

'A proceeding,' continued the court, 'professing to determine the right of property where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified by the name of a

judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.'"

In

Earle v. McVeigh, 91 U. S. 503, 510,

this court said:

"Even in proceedings *in rem*, notice is requisite in order that the sentence may have any validity. 'Every person,' said Marshall, C. J., 'may make himself a party to such a proceeding and appeal from the sentence, but notice of the controversy is necessary in order that one may become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceeding against him.'"

In

Hovey v. Elliott, 167 U. S. 409,

Mr. Justice White, in delivering the opinion of the court, said, at page 417:

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their estab-

lishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In Galpin v. Page, 86 U. S., 18 Wall, 350, the court said (p. 368):

'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'

Again, in *Ex parte* Wall., 107 U. S. 289, the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case, 17 U. S. 4 Wheat. 518: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.' * * *

The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words his property, belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. *If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law?*"

In

Lavin v. Emigrant Industrial Savings Bank, 18 Blatch. 1,

approved by this court in the case of Scott v. McNeal, 154 U. S. 34, the plaintiff sued to recover $400.00 deposited by him with the defendant. The answer of the defendant admitted the deposit in the years 1865 and 1866, but set up as a defense that an application had been made on the 14th of February, 1877, to the Surrogate of the City and County of New York for letters of administration upon the estate of Lavin; that the Surrogate decided that Lavin had died intestate, and he thereupon appointed Brennan administrator; that the defendant had paid the deposit to the administrator. The question before the court was whether the appointment of the administrator by the Surrogate and the payment to the administrator by the defendant was legal as against the plaintiff, or whether it would, if given effect, deprive the plaintiff of his property without due process of law, in contravention of the Fourteenth Amendment to the Constitution.

After reviewing the authorities the court said:

"For these reasons it must be held that the proceeding taken under the laws of New York, which are set up as justifying the defendant's refusal to pay to the plaintiff the amount of his deposits, is void as to him, because it would deprive him of his property without 'due process of law.'"

In Roller v. Holly, 176 U. S. 398, this court had before it the question whether, in an action *in rem*, the statute of Texas authorizing service of process returnable within five days to be made upon a person outside

of Texas constituted due process of law, where the person served was at the time of service in Virginia. This court said:

"In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. * * * *That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight.* * * *

Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, *or due process of law; that the judgment obtained upon such notice was not binding upon the defendant.*"

Appellants resided in Ireland. The statute of the state required that notice should be given to them. The least notice that they were entitled to was ten days, provided the service was personal service. (Pierce's Code, Sec. 2333.)

If personal service could not be made, then service by publication should have been made in the same manner as in an ordinary suit. (Pierce's Code, Sec. 2321.)

Where process issues out of the Superior Court of the State, and personal service cannot be made, service may be made by publication, but in that event the party so served is not required to appear until sixty days from the date of the first publication. (Pierce's Code, Sec. 333-337. Ballinger's Code, 4875-4879.)

If the proceeding to create the alleged nuncupative will a muniment of title be regarded as a proceeding *in rem*, still the statute required notice, and declared that the court should hear no proof until the notice had been given.

If ten days' notice in an action *in rem* instituted in Texas did not constitute due process of law as against a person served with process in the State of Virginia, we submit that a judgment divesting the appellants, then residing in Ireland, of their title to property inherited from the deceased, John Sullivan, was not due process of law, when founded on a citation issued by a court six thousand miles distant, and returnable on the same day, but at an hour already past when the process was issued.

The complainants as heirs at law and next of kin of the deceased, were the owners of his entire estate, and the title to the real estate had vested in them immediately upon the death of the deceased; that estate was in the custody of the administrator, who, of course, held it in trust for the heirs. Months after the death of the deceased the appellee Marie Carrau, without notice to the administrator and without notice to the complainants, and upon false testimony, procured the entry of a judgment which, if valid, divested the title of complainants to the property of the deceased and vested it in her; and she used that decree, rendered without jurisdiction, as a muniment of title. She asserted thereunder that she was the owner of the entire estate, and she made application to the State Court to exercise its authority and require the administrator of the estate to surrender to her possession of the real and personal property.

By the entry of the decree of probate, the title to the estate, which had vested in complainants on the death of the deceased, had become clouded. This cloud was

created by the act of the State Court, and the bill alleged that under authority of the State Court the administrator was about to surrender possession of the property to the appellee. That such a decree was void, is clear; the injury done thereby to complainants by impairing their title was depriving them of their property, and that deprivation had been effected without due process of law.

That the decree of probate was void is clearly established by the following authorities:

Smith v White, 32 Wash 414

Ball v. Clothier, 75 Pac. R. 1099 (Wash.).
In re Leonard's Will, 65 New J. L. 167.
Randolph v. Bayne, 44 Cal. 370.
Charlebois v. Bourdon, Admr., 6 Mont. 373.
Ashhurst v. Fountain, 67 Cal. 18.
Spencer v. Houghton, 68 Cal. 82.
Haws v. Clark, 37 Iowa 356.
Boales v. Shules, 29 Iowa 507.
Jones & Magee Co. v. Boggs, 63 Iowa 589.
Sprole v. Marshall, 4 Iowa 344.
Hodges v. Brett, 4 Iowa 345.
Melbourn v. Fouts, 4 Iowa 346.
Fernekes v. Case, 75 Iowa 152.
Joiner v. Delta Bank, 71 Miss. 382 (14 So. 464).
Hunsaker v. Coffin, 2 Or. 107.
Northcut v. Lemery, 8 Or. 317, 323.
Lewis v. Bishop, 19 Wash. 312.
Everett Water Co. v. Fleming, 26 Wash. 364.

If, in a suit in ejectment, the admission in evidence of a judgment rendered without jurisdiction for want of notice, and therefore not constituting due process of law, is depriving the person, whose rights are affected thereby, of his property in a manner forbidden by the Fourteenth Amendment to the Constitution of the United States, can

it be denied that to allow such judgment to be used as a muniment of title to take the property of complainants from the possession of the administrator, who holds it in trust for them, is an act equally forbidden by the amendment, and therefore one which can be prevented by injunction before it is consummated, instead of being annulled after its execution?

Vicksburg Waterworks v. City of Vicksburg, 185 U. S. 65.
Walla Walla v. Walla Walla Waterworks, 172 U. S. 1.
Pac. Elec. R. Co. v. Los Angeles, 194 U. S. 112.
Pac. Gas Improvement Co. v. Ellert, 64 F. 421.
Nashville C. & St. L. Ry. v. Taylor, 86 Fed. 168.

In the case at bar, not only did the bill show that there was involved in the suit the application of the Fourteenth Amendment to the Constitution of the United States, but the opinion of the Circuit Court shows that that court in effect held that to give any effect to the decree, probating the alleged will, which was rendered without notice to anyone and before the court had acquired any jurisdiction to hear any proof, would have the effect of depriving complainants of their property without due process of law. The opinion of the trial court shows that the court held that while the alleged will never had been made, yet if it had been made and if the deceased thereby had intended to convey to the appellee Marie Carrau his entire estate, the complainants could not be disinherited by the alleged will, because it had not been probated within six months from the death of the deceased.

In order to hold that the alleged will had not been probated within six months after the death of the de-

ceased, the court was obliged to hold that the decree of probate was a nullity. It will be seen, therefore, that the effect of the decree of probate was a vital question in the case. If the alleged will had never been probated, then the title of appellants was absolute. If the alleged will had been probated, and if it conveyed real estate, they might have been disinherited. It appears, therefore, that not only was the question of the application of the Constitution involved, but that the Constitution was applied by the trial court in deciding the case.

III.

Assuming, therefore, that there was presented by the bill a case involving the construction or application of the Constitution of the United States, the question arises, to what court should the appellee Marie Carran have appealed when the decree of the Circuit Court was rendered in favor of the complainants?

It is clear from the decisions of this court that if a constitutional question was presented by the bill, and the jurisdiction of the Circuit Court was invoked upon no other ground, this court would have exclusive jurisdiction of an appeal from the decree of the Circuit Court.

> *Union & Planters' Bank v. Memphis*, 189 U. S. 71.
> *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277.

If the jurisdiction of the Circuit Court was dependent on a federal question other than one of those specified in Sec. 5 of the Act of March 3, 1891, then the Circuit Court

of Appeals would have jurisdiction of an appeal from the Circuit Court, but its decision would not be final.

Northern Pacific R. R. Co. v. Soderberg, 188 U. S. 526.

Howard v. U. S. to the use of David Stewart, 184 U. S. 676.

If the suit is one where the jurisdiction of the Circuit Court is invoked because the construction or application of the Constitution of the United States is involved, then it is one which may be brought directly to this court from the Circuit Court, and the whole case is open upon such appeal.

Giles v. Harris, 189 U. S. 475.

Cummings v. Chicago, 188 U. S. 410.

Pac. Elec. R. R. Co. v. Los Angeles, 194 U. S. 112.

Field v. Barber Asphalt Pav. Co., 194 U. S. 618.

Holder v. Aultman M. Co., 169 U. S. 81.

Penn Mutual Insurance Co. v. Austin, 168 U. S. 685.

Loeb v. Columbia Township, 179 U. S. 472.

Whitten v. Tomlinson, 160 U. S. 231.

Chappell v. U. S., 160 U. S. 499.

Horner v. U. S., 143 U. S. 570.

This is so, although jurisdiction also exists because of diversity of citizenship.

Davis & Farnum Co. v. Los Angeles, 189 U. S. 207.

Field v. Barber Asphalt Pav. Co., 194 U. S. 618.

If diversity of citizenship is shown by the bill, and in addition thereto it appears by the bill that the case is one involving the construction or application of the Constitution of the United States, if the case could be taken to the Circuit Court of Appeals its decree would not be final, because the jurisdiction of the Circuit Court would

not have been dependent entirely on diverse citizenship; and yet, a direct appeal could have been taken to this court.

In

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277,

this court said:

"The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final it is provided that 'there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs' (Sec. 6).

And the right to two appeals would exist in every case (the litigated matter having the requisite value), where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the circuit courts of appeals, for their decisions would not come within the category of those made final. * * *

* * * and as those cases fall strictly within the terms of section 5, the appellate jurisdiction of this court in respect of them is exclusive."

In this case the court felt it necessary to modify the language which had been used in the opinion in the case of Carter v. Roberts, 177 U. S. 496, and after quoting from the opinion in the Carter case, said:

"But language should not have been used susceptible of the meaning that in cases where the jurisdiction

below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in section 5 *may have so arisen* that a direct resort to this court might be had, does not deprive the court of appeals of jurisdiction, or justify it in declining to exercise it."

It is plain from this decision that had the Constitutional question been presented in the bill along with the claim of jurisdiction on the ground of diverse citizenship, the decision would have been that the Circuit Court of Appeals had no jurisdiction. The court was careful to point out that the Constitutional question first appeared *after* the jurisdiction of the Circuit Court had attached by reason of diverse citizenship. At page 280 the court said:

"The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court *attaches solely by reason of diverse citizenship*, it follows that the court of appeals has power to review the judgment of the circuit court in every *such case*, notwithstanding constitutional questions may have arisen *after the jurisdiction of the circuit court attached*, by reason whereof the case became embraced by section 5."

If the mere existence of diverse citizenship was sufficient to vest jurisdiction in the Circuit Court of Appeals, regardless of the fact that the bill also invoked the jurisdiction of the Circuit Court on the ground of a constitutional question being involved, it would have been a sim-

ple matter to have said that the existence of diverse citizenship vested jurisdiction of the appeal in the Circuit Court of Appeals. It would have been entirely unnecessary to have carefully pointed out that the time when the Constitutional question arose in the case was *after* the jurisdiction of the Circuit Court had *attached by reason of diversity of citizenship.*

In

Cinn. H. & D. R. Co. v. Thiebaud, 177 U. S. 615,

the Circuit Court of Appeals certified certain questions to this Court, among them the following:

1. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?

2. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that the law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to such constitutional questions?

3. A third question was certified, as to whether a certain instruction disclosed a case in which it was claimed that the law of a state was in contravention of the Constitution of the United States.

This court said:

"The certificate shows that no question as to the constitutionality of the statute of Indiana relied on by

the plaintiff below, *was raised* or considered or decided *in the circuit court*, but that the objection made its appearance for the *first time in the assignment of errors* in the circuit court of appeals.

The third question propounded in the certificate must be answered in the negative, and we do not deem it necessary to answer the others."

In this case diversity of citizenship existed. It is plain that had the constitutional question appeared in the original pleading invoking the jurisdiction of the Circuit Court, the Supreme Court would have passed on the jurisdiction of the Circuit Court of Appeals when that question was certified to it, or would have held that the Circuit Court of Appeals was without jurisdiction to certify. It appearing, however, that the case in the Circuit Court of Appeals was one of which it had undoubted jurisdiction, it was unnecessary to answer a question propounded on a state of facts not in the case.

In

Union & Planters' Bank of Memphis v. Memphis,
189 U. S., 71,

diversity of citizenship did not exist. The jurisdiction of the Circuit Court had been maintained. An appeal from the Circuit Court had been taken to the Supreme Court of the United States. An appeal had also been taken to the Circuit Court of Appeals, which had affirmed the decree of the Circuit Court. From the decree of the Circuit Court of Appeals an appeal had been taken to this court. Mr. Chief Justice Fuller, in delivering the opinion of this court, said:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground

that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section 5 of the Judiciary Act of March 3, 1891 (26 Stat. at L., 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), and not to the circuit court of appeals. American Sugar Ref. Co. v. New Orleans, 181 U. S. 277. Nevertheless, an appeal having been prosecuted to the latter court, and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by Sec. 6 of the act. But the case being here, and the jurisdiction of the circuit court having depended on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the circuit court of appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act."

If, in addition to the constitutional question, diversity of citizenship had existed, the decision of the Court of Appeals would not have been final, because the jurisdiction of the Circuit Court would not have been dependent entirely upon diversity of citizenship, and the case would also have been one wherein an appeal would lie directly from the decree of the Circuit Court to this Court. If, therefore, the reason for denying jurisdiction to the Circuit Court of Appeals was that if it exercised jurisdiction the right to two appeals would exist, then it follows that the same reason applies when the diversity of citizenship does exist along with a constitutional question, equally with a case in which the constitutional question is the only ground on which jurisdiction is invokede.

The citation of the American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, in support of the statement of the opinion that unless jurisdiction was denied to the Cir-

cuit Court of Appeals in such case, the right to two appeals would exist, shows clearly that the Circuit Court of Appeals has jurisdiction of cases in which a direct appeal will lie to the Supreme Court of the United States, only when, if a decision is rendered by the Circuit Court of Appeals, its decision is final because the jurisdiction of the Circuit Court was invoked on the ground of diversity of citizenship only, and the constitutional question appeared later in the case.

The various Circuit Courts of Appeals have placed this construction upon the decision of this court in American Sugar Ref. Co. v. New Orleans, *supra*.

In

Keyser v. Lowell, 117 Fed. 400,

the Circuit Court of Appeals for the Eighth Circuit, in maintaining its jurisdiction, said:

"Where the jurisdiction of the circuit court *originally attaches solely by reason of diverse citizenship*, and a constitutional question *subsequently arises*, the circuit court of appeals has jurisdiction to review the decision of that question below and to finally determine it. American Sugar Ref. Co. v. City of New Orleans, 181 U. S. 277."

In

City of Owensboro v. Owensboro Water Co., 115 Fed. 318,

the Circuit Court of Appeals for the Sixth circuit dismissed an appeal for want of jurisdiction. Diversity of citizenship did not exist. The jurisdiction of the Circuit Court had been invoked only because of the constitutional question. The court said:

"The question is, therefore, whether the appeal in this case is one comprehended within the classes of cases enumerated by section 5 of the act referred to. If it is, it must be taken to the Supreme Court, for it is only of such cases as remain after those enumerated in section 5 have been carved out of the whole body of appellate cases that the circuit courts of appeals have jurisdiction; and as was said by Chief Justice Fuller in American Sugar Refining Co. v. City of New Orleans, 181 U. S., 277: 'Where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controvery as to a right which depends on the construction or application of the constitution or some law or treaty of the United States, (Water Co. v. Keyes, 96 U. S., 199; Blackburn v. Gold Min. Co., 175 U. S. 571; W. U. Tel. Co. v. Ann Harbor R. Co., 178 U. S. 239),' such a case falls within the exclusive appellate jurisdiction of the supreme court. Looking at the language of the act, we can see no good reason for thinking that the destination of the appeal is altered by the circumstance that other questions besides those enumerated in section 5 are comprehended in the controversy which the case presents. It is still, and none the less, a case in which a question arises of the character specified in designating what cases must go by appeal or writ of error to the supreme court. The appeal or writ of error in all cases, in which no question of the character described in section 5 is involved, goes to the circuit court of appeals under the operation of section 6, which expressly bounds the appellate jurisdiction of the latter court in that way."

At page 323, the court says:

"But if the original jurisdiction is founded *entirely* upon the ground of *diversity of citizenship*, and a constitutional question *becomes involved*, the appeal might go to *either* court. If it should go to the supreme court, that court would, of course, decide the whole case; if to the court of appeals, that court might also decide the whole

case, or certify the constitutional question to the supreme court, and, on receiving its answer, decide the case. If it should decide the constitutional question in the first instance, the unsuccessful party might apply for the writ of certiorari under the provision of the sixth section to correct any mistake made by the court of appeals upon the subject. Thus is accomplished the whole scheme by which congress intended to give to the supreme court, by one method or another, appellate power over all constitutional questions."

In

City of Owensboro v. Owensboro Water Co., 191 U. S. 358,

this court reversed the decree of the Circuit Court on a direct appeal. In the statement of the case this court makes the following statement:

"The city then took an appeal to circuit court of appeals. The appeal was dismissed on the ground that the jurisdiction of the circuit court having been invoked on a constitutional question, the appeal should have been taken directly to this court. 53 C. C. A. 146, 115 Fed. 318. The city then brought the case here from the circuit court."

Inasmuch, however, as the decree of the Court of Appeals, if it had jurisdiction, would be subject to review by this court in a case where the jurisdiction of the Circuit Court was founded both on diversity of citizenship and on the ground that a constitutional question was involved, and inasmuch as the Supreme Court would also have jurisdiction to review the decree of the Circuit Court on direct appeal therefrom, and as the Supreme

Court would have jurisdiction of the entire case, whichever court it came from, it is clear that there is just as much reason for denying the jurisdiction of the Circuit Court of Appeals in a case where jurisdiction of the Circuit Court is invoked both on the ground of diversity of citizenship and on the ground of a constitutional question being involved, as in a case where the jurisdiction of the Circuit Court is invoked solely on the ground of a constitutional question being involved.

In

Ill. Cent. R. R. Co. v. Adams, 180 U. S. 28,

diversity of citizenship existed. A temporary injunction was granted. An appeal was taken to the Circuit Court of Appeals. That court dismissed the appeal on the ground that a constitutional question was involved. (93 Fed., 852). The Circuit Court dismissed the suit for want of jurisdiction. An appeal was then taken to this court from the decree of the Circuit Court, and the question of jurisdiction certified. This court held that the Circuit Court had jurisdiction both on the ground of diverse citizenship and because of a question arising under the Constitution of the United States.

In the case of

Wright v. McFarlane & Co., 122 Fed. 770,

the Circuit Court of Appeals for the Ninth Circuit dismissed an appeal for want of jurisdiction, and while it is true that in that case diversity of citizenship did not exist, the opinion of the court shows that it would have made no difference had diversity of citizenship existed.

In commenting upon the case of Penn. Mutual Life Insurance Co. v. Austin, 168 U. S. 685, the court said:

"It will be observed that in this case the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship of the parties to the action, but the bill disclosed a second ground of jurisdiction in the allegations claiming that the ordinances of the city and law of the state were in contravention of the Constitution of the United States. These allegations presented a case in which the jurisdiction of the Circuit Court was not entirely dependent upon the opposite parties to the suit or controversy being citizens of different states, and therefore, under section 5 of the Act of March 3, 1891, the Supreme Court had exclusive appellate jurisdiction."

After citing the case of American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, and giving the history of that case, the court proceeded:

"The Supreme Court was then petitioned for a writ of certiorari or mandamus to compel the Circuit Court of Appeals to try the cause. The writ of certiorari was issued, the court holding that under sections 5 and 6 of the act of March 3, 1891, the Circuit Courts of Appeals have power to review judgments of the Circuit Courts *when the original jurisdiction attaches solely by reason of diverse citizenship, notwithstanding the fact that constitutional questions may have arisen after the jurisdiction of the Circuit Court attached;* and that in all cases the judgments of the Circuit Courts of Appeals are made final, and no review would be made by the Supreme Court, unless the constitutional questions involved therein were certified to that court by the Courts of Appeals. It was declared that the intention of the act was to distribute the appellate jurisdiction, and not in general to permit two appeals; that, in accordance with this intention, where a case appeared from the pleadings to really and substantially involve a controversy as to a right depending upon the construction or application of the Constitution or some law or treaty of the United States, it fell strictly

within the terms of section 5 of the Act, and the appellate jurisdiction of the Supreme Court in respect to such case was exclusive. The ruling was followed and approved in Hugnley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 295. See also, *Ex parte* Lennon, 150 U. S. 393, 399; Osborne v. Florida, 164 U. S. 650, 656.

The decisions of the Supreme Court in these cases clearly establish the *line* of appellate jurisdiction between the Circuit Courts of Appeals and the Supreme Court of the United States where a constitutional question is involved, and determine that, where the jurisdiction of the Circuit Court is originally invoked upon the ground that the controvery is as to a right depending upon the construction or application of the Constitution or some law or treaty of the United States, then the appellate jurisdiction of the Supreme Court in respect to such case is exclusive, and the Circuit Courts of Appeals have no jurisdiction to hear and determine the appeal."

In

Howard v. U. S. to the use of Stewart, 184 U. S. 676,

diversity of citizenship existed. Jurisdiction also appeared in the Circuit Court because the suit was upon the bond of a Clerk of the United States Court. The case was one, therefore, which could not be brought directly to this court from the Circuit Court, because it involved the construction of a *law* of the United States. The jurisdiction of the Circuit Court of Appeals, however, was not final, because the jurisdiction of the Circuit Court did not depend entirely upon diversity of citizenship. Mr. Justice Harlan was careful to point out that the case was one which could not be brought directly to this court. If the case had been one which could have been brought directly to this court, and was also one of which the Circuit Court of Appeals was granted jurisdiction, then the

decision of the Circuit Court of Appeals would have been final. At page 681, Mr Justice Harlan said:

"It results that, although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully upon Federal grounds. And as the case was one which could not have been brought here directly from the circuit court, the final judgment of the circuit court of appeals could be reviewed in this court upon writ of error sued out by the defendants."

It is respectfully submitted that the foregoing authorities establish the following rules of construction of the Act of March 3, 1891, with reference to the jurisdiction of this Court and of the Circuit Courts of Appeals:

1. When the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship only, and the jurisdiction is not in issue in the Circuit Court, the Circuit Court of Appeals has final jurisdiction of all questions in the case, on an appeal being taken to that Court.

2. When the jurisdiction of the Circuit Court is invoked upon the ground of diverse citizenship and also upon grounds other than those mentioned in section 5, and the jurisdiction of that Court is not in issue there, then the Court of Appeals has appellate jurisdiction and the Supreme Court has no direct appellate jurisdiction, but the decree of the Circuit Court of Appeals is not final, because the jurisdiction of the Circuit Court was not dependent entirely upon diverse citizenship.

3. When the jurisdiction of the Circuit Court is invoked, not on the ground of diverse citizenship nor upon any ground mentioned in section 5, but upon the ground that the suit arises under the laws of the United States,

and the jurisdiction of the Circuit Court is not in issue there, then the Circuit Court of Appeals has appellate jurisdiction, and the Supreme Court has no direct appellate jurisdiction, but the decree of the Circuit Court of Appeals is not final.

4. When the jurisdiction of the Circuit Court is invoked solely upon the ground that the case is one arising under the 4th, 5th or 6th subdivisions of section 5 of the Act of March 3, 1891, then the jurisdiction of the Supreme Court is exclusive and the Circuit Court of Appeals is without jurisdiction.

5. When the jurisdiction of the Circuit Court is invoked both on the ground of diverse citizenship, and also upon one of the grounds mentioned in the 4th, 5th or 6th subdivisions of section 5, then the case must be taken directly to the Supreme Court and the Circuit Court of Appeals has no jurisdiction.

6. When the jurisdiction of the Circuit Court is invoked solely upon the ground of diversity of citizenship, and in the progress of the case a question arises which, if pleaded in the bill, would have given exclusive jurisdiction on appeal to the Supreme Court, then jurisdiction may be exercised directly by the Supreme Court, or by the Circuit Court of Appeals. If an appeal in such case should be taken to the Circuit Court of Appeals, its decree would be final, because the jurisdiction of the Circuit Court was dependent entirely upon diversity of citizenship.

7. When the jurisdiction of the Circuit Court is in issue in that court, the Circuit Court of Appeals is without jurisdiction to decide that question.

This construction of the Act will accomplish the purpose of preventing two appeals where a direct appeal

could have been taken to this court. In other words, the only case in which an appeal from the decree of the Circuit Court of Appeals to this court will lie as a matter of right, is when the question involved cannot be determined on a direct appeal from the decree of the Circuit Court to this Court. On the other hand the Circuit Court of Appeals has no jurisdiction of a question which can be determined on a direct appeal to this Court unless the decree of the Circuit Court of Appeals will be final if an appeal be taken to that Court. To hold, however, that the mere existence of diversity of citizenship is sufficient to vest the Circuit Court of Appeals with jurisdiction of an appeal in a case where the jurisdiction of the Circuit Court was invoked upon constitutional grounds, as well as upon the ground of diversity of citizenship, is to frustrate what this Court has repeatedly decided was the express intention of the act, namely, to prevent two appeals.

We submit, therefore, that inasmuch as the jurisdiction of the Circuit Court was originally invoked on the ground that the case was one involving the application of the Constitution of the United States, the Circuit Court of Appeals was without jurisdiction, and its decree should be reversed with the direction to dismiss the appeal of Marie Carrau from the decree of the Circuit Court.

IV.

Assuming, for the sake of argument, that the jurisdiction of the Circuit Court was invoked solely on the ground of diversity of citizenship, still we submit that the Circuit Court of Appeals had no jurisdiction to determine the question of the jurisdiction of the Circuit

Court, because the jurisdiction of that Court was in issue in the Circuit Court.

The appellee Marie Carrau in the Circuit Court filed a motion to dismiss because the matters pleaded in the bill were "not cognizable in the Federal Court" (R. p. 29), and also another motion that the action abate "for the reason that this court has no jurisdiction of the subject matter of this action" (R. p. 24). The jurisdiction of the Circuit Court, therefore, as a Federal Court, was in issue. It is true that that Court sustained the jurisdiction.

Section 5, of the Act of March 3, 1891, is as follows:

"That appeals or writs of errors may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. * * * "

"Sec. 6. That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States."

The Circuit Court of Appeals for the Second Circuit uniformly holds that it, while having jurisdiction of the case, has no jurisdiction to decide the question of jurisdiction when the jurisdiction of the Circuit Court was in issue in the Circuit Court.

In

Sun Printing & Pub. Ass'n. v. Edwards, 194 U. S. 377,

the Circuit Court of Appeals for the Second Circuit certified to this Court the question of the jurisdiction of the Circuit Court. In the certificate the following statement was made:

"Upon examination of the record it appears that in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the Circuit Court is in issue. Under Sections 5 and 6 of the Act of March 3, 1891, writs of error in such cases are to be taken direct to the Supreme Court, *and the grant of appellate jurisdiction to the Circuit Courts of Appeal does not include such cases.*

In accordance, therefore, with the practice indicated in Cincinnati, H. & D. Co. v. Thiebaud, 177 U. S. 615, and American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, and followed by this Court in U. S. v. Lee Yen Tai, 51 C. C. A. 299, this Court elects to reserve judgment upon the other questions, and to certify the question of jurisdiction to the Supreme Court."

In answering the question of jurisdiction certified, this Court did not comment upon the statement of the Circuit Court of Appeals for the Second Circuit, to the effect that the determination of the question of jurisdiction where the jurisdiction of the Circuit Court was in issue, was not within the grant of appellate jurisdiction to the Circuit Courts of Appeal.

In

Fisheries Co. v. Lennen, 130 Fed. 533,

decided April 21, 1904, the Circuit Court of Appeals for the Second Circuit, said:

"The first assignment is based upon the contention that the Circuit Court had no jurisdiction because the matter in demand does not exceed $2000. Under the construction adopted in this Circuit of the sixth section of the Evart's Act (Act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]), the question of the jurisdiction of the court below is not before us for review. United States v. Lee Yen Tai, 113 Fed. 465, 51 C. C. A. 299."

In

U. S. v. Lee Yen Tai, 113 Fed. 465,

the Circuit Court of Appeals for the Second Circuit, in considering the question of its jurisdiction to decide a constitutional question, said:

"The Circuit Court of Appeals has no jurisdiction in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty is drawn in question. In such cases an appeal or writ of error lies directly to the Supreme Court, and the Circuit Court of Appeals can only exercise appellate jurisdiction in cases other than those. Authority, however, is given the Circuit Court of Appeals in every 'subject within its appellate jurisdiction' to certify to the Supreme Court any question of law concerning which it desires the instruction of that Court 'for its proper decision.' Act of March 3, 1891, Sec. 6. The Supreme Court in several cases has held that, although a case which has been brought to the Circuit Court of Appeals by an appeal or writ of error may involve a question which that Court has no jurisdiction to entertain, it may nevertheless, if the case also involves other questions, determine those questions, and certify to the Supreme Court the question which it may not entertain. U. S. v. Jahn, 155 U. S. 109; Carter v. Roberts, 177 U. S. 496."

After quoting from the Carter case, the Circuit Court of Appeals proceeded:

"This language is relied upon by counsel for the appellant as meaning that the Circuit Court of Appeals may in deciding the whole case decide the constitutional question, or, as in this case, a question involving the construction of a treaty. We do not regard it as intended to bear that meaning, and, as we read the language, it means simply that the Circuit Court of Appeals may decide the whole case by affirming or reversing the decision under review without passing upon the constitutional or treaty question, or, if it sees fit, may reserve judgment and certify that question."

In

St Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196,

the Circuit Court of Appeals for the Eighth Circuit dismissed an appeal for want of jurisdiction, and said:

"Act of March 3, 1891, c. 517, 26 Stat. 826, which created the Circuit Courts of Appeals, provides in section 5, (26 Stat. 827), that 'appeals or writs or error may be taken from * * * the existing Circuit Courts directly to the Supreme Court * * * in any case in which the jurisdiction of the Court is in issue,' and in section 6 (26 Stat. 828), that the Circuit Courts of Appeals 'shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the * * * existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.' If, therefore, a writ of error could have been taken from the Supreme Court directly to the Circuit Court to review the question here presented under

section 5 in this suit, this is not one of the other cases of which this court is given jurisdiction."

At page 201 the Court said:

"The second objection to the dismissal of the writ is that the Circuit Courts of Appeals are given jurisdiction by section 6 of the Act creating them to review all jurisdictional questions which arise in the Circuit and District Courts of the United States in cases in which their jurisdiction is based solely on diversity of citizenship. A careful reading of section 6, however discloses no such grant of power. Upon this subject that section provides only that the Circuit Courts of Appeals 'shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the * * * existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final * * * in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States.' *But it is only in cases not provided for by the preceding section that the Circuit Courts of Appeals are given appellate jurisdiction, and no case in which jurisdiction of the Circuit Court is in issue falls in the class of cases not provided for by section 5.*"

At page 202, the Court said:

"Section 6 does provide that in cases in which the jurisdiction of the Circuit Court is founded on diversity of citizenship the judgments and decrees of the Circuit Court of Appeal shall be final. *But this provision in no way limits the jurisdiction of the Supreme Court under section 5, nor does it enlarge the appellate jurisdiction of the Courts of Appeals.* * * *

The cases of American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 281, and Ayres v. Polsdorfer, 187 U. S. 585, do not lead to a different result. The question there considered was the jurisdiction of the Circuit

Courts of Appeals to hear and determine constitutional questions arising in cases in which the jurisdiction of the Circuit Courts was founded on diversity of citizenship. The jurisdiction of the Circuit Courts over the subject matters and the parties to the suits was not challenged or in issue in those cases, and, as the Supreme Court well said in Ayres v. Polsdorfer at page 595, 187 U. S., 'as to such questions other rules apply than those we have expressed in this opinion.' "

In this connection it should be borne in mind that the real question in the case of

McLish v. Roff, 141 U. S. 661,

which was the first decision rendered by this Court construing the Act of March 3, 1891, establishing the Circuit Court of Appeals, was whether the question of the jurisdiction of the Circuit Court could be certified to this Court before final judgment. That was the only question involved in that case.

In the case of

U. S. v. Jahn, 155 U. S. 109,

the jurisdiction of the Circuit Court was *not in issue in that Court*. The case, therefore, did not fall within the first subdivision of section 5. It was not a case, therefore, in which a direct appeal could have been taken to this Court on the jurisdictional question. The Circuit Court of Appeals therefore had undoubted jurisdiction to determine the question of jurisdiction, because in the Circuit Court the case contained none of the questions provided for by section 5. Notwithstanding that fact, this Court said:

"It is conceded that the United States assigned errors on the merits, as well as the error under consideration,

and as the question of *jurisdiction* lay at the threshold, and the *intent* of the Act of March 3, 1891, was *that that question should be determined by this Court*, the Circuit Court of Appeals properly suspended any consideration of the case upon the merits until that question could be determined upon certificate."

As stated, in the Jahn case, the jurisdiction of the Circuit Court *was not in issue in the Circuit Court.* The first subdivision of section 5 of the Act of March 3, 1891, specifically provides that a direct appeal may be taken to this Court in all cases where the jurisdiction of the Circuit Court is in issue. The grant of appellate jurisdiction to the Circuit Court of Appeals is in other cases than those provided for in section 5, and, as stated in

St. Louis Cotton Compress. Co. v. American Cotton Co., 125 Fed. 196,

"But it is only in cases not provided for by the preceding section that the Circuit Courts of Appeals are given appellate jurisdiction, and no case in which jurisdiction of the Circuit Court is in issue falls in the class of cases not provided for by section 5."

It is therefore respectfully submitted that the Circuit Court of Appeals had no jurisdiction to determine that the Circuit Court had no jurisdiction, when the jurisdiction of the Circuit Court *was in issue in the Circuit Court.*

We submit, therefore, that as the Circuit Court of Appeals had no jurisdiction of the appeal, which counsel for appellee admit, in their motion to dismiss, is the case, the decree of the Circuit Court of Appeals should be

reversed with directions to dismiss the appeal of Marie Carrau.

If, on the other hand, the Circuit Court of Appeals did have jurisdiction, and its decree was final, as the only question decided was the jurisdiction of the Circuit Court, and as

"The intent of the Act of March 3, 1891, was that that question should be determined by this Court,"

(U. S. v. Jahn, 155 U. S. 109),

the writ of certiorari applied for in April last by appellants should be granted.

That the Circuit Court had jurisdiction of the suit, both on account of the subject matter and because of diversity of citizenship existing between the parties, and that all parties who had any interest in the matter were before that court, is, we believe, plainly shown by the briefs on file in this court on the application for *certiorari*, to which briefs we respectfully ask the attention of the court, if it should become necessary to consider the application for the writ of *certiorari*.

Respectfully submitted,

JAMES B. HOWE,
Counsel for Appellants.

SAMUEL H. PILES,
GEORGE DONWORTH,
CHARLES H. FARRELL,
F. D. McKENNEY,
Of Counsel.